No. 11,766

United States Circuit Court of Appeals

For the Ninth Circuit

BURNHAM CHEMICAL COMPANY, a corporation,

Appellant,

vs.

BORAX CONSOLIDATED, LTD., a corporation, PACIFIC COAST BORAX COMPANY, a corporation, UNITED STATES BORAX COMPANY, a corporation, and AMERICAN POTASH & CHEMICAL CORPORATION, a corporation,

Appellees.

Reply Brief of Appellant Burnham Chemical Company to Brief of Borax Consolidated, Ltd., Pacific Coast Borax Company and United States Borax Company.

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Subject Index

		Page
I.	Appellees Cannot Inject New and Different Causes of Action Not Sued Upon	2
II.	Even If the Evidence of Such Prior Overt Acts Could Possibly Be Held Admissible, the Pre-Trial Order of the Lower Court Was Error	8
	The Pre-Trial Order Was Directly Contrary to the Holding of This Court	18
III.	As to the Foster & Kleiser Case	21
IV.	As to the Clam That the Complaint Does Not Allege Facts Constituting Fraudulent Concealment (Brief, p. 67)	24
V.	As to the Claim That the Present Is Not a Suit in Equity (Brief, p. 50)	25
VI.	As to the Contention That a Denial of a Claim or Accusation of Wrongdoing Is Not Fraudulent Concealment (Brief, p. 69)	27
VII.	The Lower Court Erred in Refusing to Allow Counsel for Appellant to Read the Complaint and Answer to the Jury	29
VIII.	As to the Continuing Conspiracy	32
Conclusion		38

Table of Authorities Cited

CASES

Pages

Albert Pick-Barth Co. v. Mitchell etc., 57 F.2d, 96 (Cert. denied 286 U.S. 552; 52 S.Ct. 503) 6
American Surety Co. v. Pauly, 170 U.S. 133 20

Chattanooga Foundry etc. v. Atlanta, 203 U.S. 390; 27 S.Ct. 65 7

Fleishhacker v. Blum, 109 Fed. 2d, 543 18
Foster & Kleiser Co. v. Special Site Sign Co., 85 F.2d, 742 (Cert. den. 299 U.S. 613) 21, 32

Hansen v. Bear Film Co., 28 Cal. 2d, 154; 168 P.2d, 946, subds. 11 and 12 19
Heroz v. Capital Co., 27 C.(2) 349, subds. (5) and (6) 17
Holmberg v. Armbrecht, 327 U.S. 392; 66 S.Ct. 582 ..... 12, 19, 39

Kalkruth v. Resort Properties, 57 Cal. App. 2d, 146; 134 Pac. 2d, 513 20
Kimball v. P. G. & E., 220 Cal. 203 27

Maltz v. Sax, et al., 134 F.2d, (Cert. den. 319 U.S. 772) 33

Nash v. United States, 229 U.S. 373; 33 S.Ct. 780 4
Northern Kentucky Telephone Co. v. Southern Bell Telephone, Etc., 73 F.(2), 333 (C.C.A. 6) (Cert. den. 55 S.Ct. 546) 33

People v. Wisecarver, 67 Cal. App. 2d, at 207 17

Sears v. Rule, 27 Cal. 2d, 131; 163 Pac. 2d, 443 ..... 11, 28

United States v. Armour (10 Cir.) 137 F.2d, at 271 6
United States v. Buxton Lines, 165 F.2d, 993 (4th Cir.) at p. 995, subd. (1) 24
United States v. General Motors etc., 121 F.2d 6
United States v. Kissel, 218 U.S. 601 32
United States v. New York etc., (5th Cir.) 137 F.2d, 459; (Cert. denied 320 U.S. 783) 5, 6

Pages

U. S. v. Procter & Gamble Co., 47 F. Supp. at p. 678 (D.C. Mass.) 15
United States v. Socony etc., 310 U.S. 150; 60 S.Ct. 811 5
United States v. Southern Pacific Co., 75 F. Supp. 336 (Or.) p. 339, subd. 2 7

Weinberg v. Sinclair Refining Co., 48 F. Supp. 203, Subd. (4) p. 205 33
Wells v. Zenz, 83 Cal. App. 137 16

STATUTES

Civil Code of the State of California:
Sec. 1708 ..... 16, 18
Sec. 338 18

15 U.S.C.A. Sec. 15 32

TEXTS

37 C.J.Sec., p. 204 ..... 14, 15
37 C.J.S., page 221 15
37 C.J.Sec., page 246, sec. 16(b) 17

Funk & Wagnall's New Standard Dictionary 17

Storey's Equity Jurisprudence, Vol. 1, Secs. 186, 187 16

Webster's International Dictionary of the English Language 20

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Reply Brief of Appellant Burnham Chemical Company to Brief of Borax Consolidated, Ltd., Pacific Coast Borax Company and United States Borax Company.

Appellees' brief attempts to handle this appeal as though it was one from a judgment after a full trial on the merits, rather than an appeal from a judgment dismissing the case upon the ground of the statute of limitations pursuant to a motion therefor.

There were two motions made, one to dismiss on the ground of the statute of limitations, the other for summary judgment. The motion for summary judgment was denied (Tr. pp. 183, et seq.) and subsequently the case went to trial upon the special issue of the statute of limitations. The question to be presented to the jury was set forth in the pre-trial order (Tr. p. 195).

Appellees have ignored entirely the claim of appellant that "The Court erroneously usurped the function of the jury," a discussion of which commences on p. 23 of our opening brief, and reference to which is again made. We again contend that it was reversible error for the Court to withdraw the case from the jury.

I.

APPELLEES CANNOT INJECT NEW AND DIFFERENT CAUSES OF ACTION NOT SUED UPON.

Appellees answered only three paragraphs of the complaint, i.e., those charging concealment and fraud, set forth in the amendment to the complaint, paragraphs 81a and 81b (Tr. pp. 100 et seq.) and also paragraph 75 of the original complaint referring to the conversations between Mr. Burnham and Mr. Zabriskie; none of the other allegations of the complaint were denied or referred to in any respect, so that when the matter went to trial on the special issue of the statute *all of the other allegations of the complaint were admitted.* See authorities cited in our opening brief, p. 28, subd. III. Therefore such admissions included the formation of the 1929 conspiracy, its continuance, and all of the overt acts alleged. **The cause of action charged upon was solely the conspiracy formed in November 1929,** not upon any of the conspiracies

involving or surrounding the fraud order, the price cut, or other conspiracies formed prior to the conspiracy charged upon, viz. that of November, 1929. **Appellees make no reference whatsoever to the cause of action sued upon but attempt to confuse the issue by a discussion of such matters as the price cut, the fraud order, and like conspiracies which antedated the conspiracy of '29 and which in themselves form no part of such conspiracy.** The fact that appellees may have continued such activities and overt acts after the formation of the '29 conspiracy does not make such prior conspiracies any part of the conspiracy sued upon.

Therefore, under the pleadings the sole question which should have been presented to the jury was whether or not appellant had discovered or should have discovered the existence of the November 1929 conspiracy sued upon, within the period of the statute of limitations.

Instead, the Court permitted appellees to confuse the issue and make each one of the conspiracies surrounding the overt acts, *even those performed prior* to the formation of the '29 conspiracy, causes of action within appellant's complaint. Such of course was pure error, for it rested entirely with appellant as to which cause of action it elected to charge upon, and having made such election of the conspiracy of November 1929 as its cause of action, neither the Court nor appellees had any right to inject any other causes of action into the case.

The present action is based upon a conspiracy to violate the anti-trust law, resulting in damage to appellant. The overt acts are no part of the "cause of action." As we have stated, it was appellant's right to choose its cause of action; it did so by basing its complaint upon the violation

of the anti-trust acts by appellees in the making of the conspiracy of November 1929. That was a separate and distinct offense, as was each of the conspiracies involving the fraud order, the price cut, and other overt acts. Appellant could have sued upon any of such conspiracies forming the basis of any of such overt acts but did not elect to do so. Therefore the issues presented herein are solely and wholly as to the facts and the damage resulting and growing out of the conspiracy of November 1929, and the other conspiracies and overt acts referred to by appellees form no part of such '29 conspiracy and the Court should not have permitted evidence as to any of the same, for by no stretch of the imagination could it be contended that such overt acts performed prior to November 1929 constituted either knowledge or discovery, and certainly not belief, of a conspiracy formed long thereafter, to wit, in November 1929.

The law is well settled that overt acts form no part of a conspiracy, and that the conspiracy is the "cause of action." Of course, if appellant cannot prove damage resulting from the conspiracy it cannot recover, but that does not mean that appellees have not violated the law and committed an illegal act by the formation of the conspiracy of 1929. No plaintiff can recover legal damages without proving damage under any cause of action, but that does not mean that a plaintiff cannot have a cause of action without *legal* damage.

In *Nash v. United States,* 229 U.S. 373; 33 S.Ct. 780 it was held:

> "No overt act need be alleged in an indictment charging a conspiracy to restrain or monopolize interstate trade or commerce, under the antitrust act of

July 2, 1890, since that statute does not make the doing of any act other than the act of conspiring a condition of liability."

Also see *United States v. Socony etc.,* 310 U.S. 150; 60 S.Ct. 811, where it was held:

"Proof that there was a conspiracy, that its purpose was to raise prices, and that it caused or contributed to a price rise, is proof of the actual consummation or execution of an unlawful conspiracy in restraint of trade and commerce. Sherman Anti-Trust Act, Sec. 1, 15 U.S.C.A. Sec. 1."

See the discussion on this point on p. 219 of the Official Report.

Likewise, see *United States v. New York etc.,* (5th Cir.) 137 F.2d, 459; (Cert. denied 320 U.S. 783); at 463 the Court said:

"* * * Nash v. United States, 229 U.S. 373, 33 S.Ct. 780, 57 L.Ed. 1232, and United States v. Socony Vacuum Co., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129, settle it that the offense of conspiracy under the Sherman Act is complete when the agreement or conspiracy is formed, that jurisdiction and venue lie in the district where it was formed, and that it is not necessary to allege the commission of an overt act. It is settled, too, that a conspiracy in restraint of trade is, or may be, a continuing offense, United States v. Kissel, 218 U.S. 601, 31 S.Ct. 124, 54 L.Ed. 1168, and that 'A conspiracy thus continued in effect renewed during each day of its continuance,' United States v. Borden Co., 308 U.S. 188, 60 S.Ct. 182, 190, 84 L.Ed. 181. As each new member later joins the conspiracy, he in effect makes the agreement then and there to become a party to it."

Also, on p. 464 the Court said:

> "* * * It is not the form of the combination or the particular means used, but the result to be achieved that the statute condemns. It is equally clear that it is of no importance whether the means used to accomplish the unlawful objective are in themselves unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts, yet if they are a part of the sum of the acts which are relied upon to effectuate the conspiracy the Sherman Act forbids, they fall within the condemnation of the statute."

In *United States v. General Motors etc.,* 121 F.2d it was said (pp. 404 and 405):

> "* * * proof of the conspiracy would have been sufficient to sustain a conviction even if the conspiracy had never been carried out. This is true because the offense condemned by the Sherman law is the act of conspiring, and neither actual restraints nor overt acts need be proved. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 252, 60 S.Ct. 811, 84 L.Ed. 1129."

Also see *United States v. Armour* (10 Cir.) 137 F.2d, at 271.

The same rule is applicable to civil actions under Sec. 15. See *Albert Pick-Barth Co. v. Mitchell etc.,* 57 F.2d, 96 (Cert. denied 286 U.S. 552; 52 S.Ct. 503), which was a civil action for treble damages. On p. 102 the Court stated:

> "To constitute an offense under section 1 of the Sherman Act, it is not necessary, if a conspiracy is proven, the purpose and intent of which was to eliminate by unfair means a competitor in interstate trade, to show that the public was affected, and to what

> extent. Nor is it necessary under this act, as it is at common law, to prove any overt acts in order to constitute the offense defined in section 1; but if overt acts are proved in furtherance of the offense defined in section 1, and anyone is thereby injured in his business or property, the conspirators under section 7 of the Act are liable therefor."

The *Pick-Barth* case cites

> *Chattanooga Foundry etc. v. Atlanta,* 203 U.S. 390; 27 S.Ct. 65,

which was also a civil action and which holds that Congress "had power to give an action for damages to an individual who suffers by breach of the law" (citing a case in support). Pp. 396-397 Official Reports.

These authorities confirm the claim expressed above: That the conspiracy formed by appellees *constituted in itself a wrong which immediately gave to appellant its cause of action.* They demonstrate the distinction between *the cause of action* (the conspiracy) *and the damages suffered by appellant as a result thereof* (the overt acts).

Therefore, appellant having selected its cause of action, neither the Court below nor appellees could force upon it as issues in this case other and entirely different causes of action such as the fraud order and the price cut.

In *United States v. Southern Pacific Co.,* 75 F. Supp. 336 (Or.) p. 339, subd. 2, the Court said:

> "It is a cardinal rule in all courts and tribunals that the filing of an action fixes the controversy. In no system of pleading can after occurring events be litigated except by filing of a supplemental pleading by consent of the court." (Citing cases)

The Court also said (p. 339):

> "* * * A new and distinct lawsuit should never be injected into a case by filing a supplemental pleading. This rule is inherent in all systems of pleading, common law, code or federal. It is required by the necessities. Confusion would otherwise result. Here the previous discussion shows that subsequent events raised entirely new and different issues for determination." (Citing Southern Pacific Co. v. Conway, 8 Cir., 115 F.2d 746.)

For this reason appellant objected to any testimony, on the cross-examination of Mr. Burnham, along these lines, but all of such objections were overruled (Tr. pp. 405 to 408).

II.

EVEN IF THE EVIDENCE OF SUCH PRIOR OVERT ACTS COULD POSSIBLY BE HELD ADMISSIBLE, THE PRE-TRIAL ORDER OF THE LOWER COURT WAS ERROR.

To refresh our memories as to the provisions of the pre-trial order, permit us to set it forth again (Tr. p. 195):

> "At any time from May 17, 1929, to October 10, 1939, did plaintiff know or have good cause to believe that its business had been theretofore damaged by acts of the defendants in violation of the Anti-Trust laws of the United States?"

Though not expressly so stated, the offer of such evidence by appellees was for the purpose of meeting the question presented by the pre-trial order and to prove that appellant did know *or have good cause to believe* that its business had been theretofore damaged. "Theretofore"

refers to a period antedating May 17, 1929, which was some five months prior to the formation of the November 1929 conspiracy sued upon. This was for the purpose of overcoming appellant's charges of fraud and concealment of such conspiracy sued upon and of the fact that it did not, due to such fraud and concealment, discover the conspiracy of November 1929 until the action by the Government in the fall of 1944 against most of these appellees. Mr. Burnham, president of appellant, testified (Tr. pp. 754-5) as follows:

"Q. When did you first obtain any knowledge of the so-called 1929 conspiracy which you have described in detail in your complaint?

A. In the fall of 1929.

Q. (By Mr. Carr): 1929?

A. 1944, excuse me. I was thinking of the 1929 agreement.

Mr. Carr: Mr. Reporter, what was the previous answer of the witness?

(The reporter reading):

'In the fall of 1944.'

Q. (By Mr. Carr): Let me ask you this: At any time prior to the fall of 1944, did you believe that such a conspiracy as alleged in your complaint, known as the 1929 conspiracy, existed?

A. No."

Further, Mr. Burnham testified (Tr. p. 759):

"Q. Did you believe that such a conspiracy as alleged in your complaint and known as the 1929 conspiracy existed?

A. No."

Likewise, further testimony (Tr. pp. 760-61):

"Q. Mr. Burnham, did you ever prior to the fall of 1944 hear of any agreement entered into by the defendants in reference to price cuts or monopolization of the borax industry?

A. Could you state that question again?

Mr. Harrison: Just a moment, please. I do not understand what the question means unless it is a mere repetition of the previous question.

Mr. Carr: No, it is another thing, another phase. Will you read the question, Mr. Reporter?

(Question read.)

A. Not by these defendants in our case."

The amendment to the complaint, par. 81a, alleges that appellant had no knowledge of the conspiracies or combinations set forth, or the intent or purpose of the defendants until on or about the commencement of the action of the United States v. certain defendants herein, filed September 14, 1944 in the United States District Court for the Northern District of California.

The question of the correctness of such pre-trial order is not directly discussed by counsel in their brief; the only reference thereto is sub-paragraph 1, p. 72, and even that does not squarely discuss the subject. Counsel attempt to escape the error inherent in the pre-trial order by claiming that there was no fraudulent concealment charged or proved, and that the present is not a case based on fraud. Those questions will subsequently be discussed herein, but for the purpose of the point presently at issue, they have no bearing. The fact that appellees admitted, by their failure to deny any of the allegations of the complaint other than the three paragraphs described above,

completely refutes the claims made under this subdivision 1, page 72. The lower Court must have considered that the question of "fraud and concealment" was present or it never would have made its pre-trial order in the form that it did. Appellees pleaded the statute of limitations and appellant in effect alleged an estoppel against such plea due to fraud, invoking the rule that where fraud is present the statute does not begin to run until the "discovery of such fraud." The rule is well set forth in the case of

Sears v. Rule, 27 Cal. 2d, 131; 163 Pac. 2d, 443.

On p. 147 of California Reports the Court laid down the rule:

> "Where an action is based 'on the ground of fraud' and therefore within the three-year statute of limitations, the cause of action is not deemed to have accrued until the discovery of the facts constituting the fraud. (Code Civ. Proc., Sec. 338, subd. 4.) When the right of action is not based upon fraud the exception provided in subdivision 4 of section 338 is not available to the plaintiff. *Nevertheless,* if the defendant, after committing the wrongful act, has fraudulently concealed the facts from the plaintiff, who by reason of such concealment did not discover that he had a right of action until too late to sue, the defendant will be estopped from taking advantage of his own wrong by asserting the statute of limitations. (Pashley v. Pac. Elec. Ry. Co., 25 Cal. 2d 226, 231 (153 P.2d 325). In such a case, in determining when the plaintiff discovered, or should have discovered, the facts giving rise to his cause of action, the same rules govern that are applicable in cases falling within subdivision 4 of section 338 of the Code of Civil Pro-

cedure. (Kimball v. Pacific Gas & Elec. Co., 220 Cal. 203, 215 (30 P.2d 39).)"

The last portion of the above quotation, commencing with the word "nevertheless" sets forth the present situation exactly. Here appellees committed a wrongful act by entering into the conspiracy of 1929 in violation of Secs. 1 and 2 of the antitrust act. Pursuant to such conspiracy they inflicted grievous damages upon appellant. Appellant had no knowledge of or reason to believe in the existence of such '29 conspiracy until long after the infliction of the damages in question. It discovered such conspiracy when the Government instituted its proceedings in 1944. By that time the statute of limitations, *so far as a strict action at law was concerned*, barred an action at law by appellant under the antitrust laws *but* appellees having concealed from appellant their wrongful conspiracy of November 1929, and having fraudulently carried on the same, *are estopped* from pleading the statute in this present action. It is there that Equity steps in to remedy what otherwise would be a grievous injustice. *Estoppel* is cognizable only in equity, hence the present case belongs on that side of the court, and the rule of *Holmberg v. Armbrecht,* 327 U.S. 392; 66 S.Ct. 582 becomes applicable. As stated in the *Holmberg* case (327 U.S. 392, subds. 9 to 12 incl.):

> "* * * If want of due diligence by the plaintiff may make it unfair to pursue the defendant, fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time.
>
> "Equity will not lend itself to such fraud and historically has relieved from it. It bars a defendant

from setting up such a fraudulent defense, as it interposes against other forms of fraud. And so this court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party'. Bailey v. Glover, 21 Wall. 342, 348, 22 L.Ed. 636; and see Exploration Co. v. United States, 247 U.S. 435, 38 S.Ct. 571, 62 L.Ed. 1200; Sherwood v. Sutton, Fed. Cas. No. 12,782, 5 Mason 143.

"This equitable doctrine is read into every federal statute of limitation. If the Federal Farm Loan Act had an explicit statute of limitation for bringing suit under Sec. 16, the time would not have begun to run until after petitioners had discovered, or had failed in reasonable diligence to discover, the alleged deception by Bache which is the basis of this suit. Bailey v. Glover, supra; Exploration Co. v. United States, supra; United States v. Diamond Coal Co., 255 U.S. 323, 333, 41 S.Ct. 335, 337, 65 L.Ed. 660. It would be too incongruous to confine a federal right within the bare terms of a State statute of limitation unrelieved by the settled federal equitable doctrine as to fraud, when even a federal statute in the same terms would be given the mitigating construction required by that doctrine."

This case must be decided on the present condition of the pleadings, and all of the many and vicious wrongs set out in the complaint and inflicted upon appellant by appellees are admitted for the purposes of this motion, and

stand as wrongful acts committed by appellees pursuant to the conspiracy entered into by them in November 1929. If the concealment by Bache in the *Holmberg* case of his ownership of the shares of stock there in question called for application of the doctrine of estoppel as was there applied, certainly the many illegal, vicious and unfair activities of appellees as set forth in the complaint herein likewise constitute a basis for the application of such doctrine, an equitable principle of justice and fair play.

As stated, estoppel is only applicable in Equity, and Equity having taken jurisdiction through its estoppel arm, will hold the case and take it through to its conclusion.

Counsel claim (p. 67) that there is no evidence of fraud or concealment in the present cause. Wholly aside from the allegations of the complaint as to such fact, **a conspiracy to destroy another financially is in itself a fraud upon the party against whom it is directed.** (The conspiracy charged upon herein is admitted.)

An examination of many cases and texts leads to the inescapable conclusion that such statement is absolutely correct. The conclusion stated is self-evident and constitutes an expression of natural justice. The word "fraud" covers many situations and certainly a conspiracy to injure another is in itself a fraud upon the party against whom such conspiracy is directed. In

37 *C. J. Sec.*, p. 204

it is said in part:

> "* * * In its (fraud's) general or generic sense, it comprises all acts, omissions, and concealments involving a breach of legal or equitable duty and resulting in damage to another, * * *"

37 *C.J.S.*, page 221:

"Fraud may be committed by actions as well as by words and the elements are the same whether it originates in a conspiracy or is committed by an individual without aid or cooperation."

Here the conspiracy charged, and admitted, was a violation of the anti-trust laws, Secs. 1 and 2 thereof, and certainly a conspiracy to violate such laws, with the purpose and intent of destroying appellant, constituted a fraud upon appellant. Conspiracies such as the present are self-concealing. Conspirators do not shout their purposes from the housetops.

Fraud is defined in

U. S. v. Proctor & Gamble Co., 47 F. Supp. at p. 678 (D.C. Mass.)

as follows:

"Broadly, 'fraud' has been defined as 'any artifice whereby he who practices it gains, or attempts to gain, some undue advantage to himself, or to work some wrong or do some injury to another, by means of a representation which he knows to be false, or of an act which he knows to be against right or in violation of some positive duty.' Commonwealth v. Tuckerman, 10 Gray, Mass., 173, 203, cited with approval in Commonwealth v. O'Brien, 305 Mass. 393, 397, 398, 26 N.E.2d 235. But, as was stated in Foshay v. United States, 8 Cir., 68 F.2d 205, 211: 'To try to delimit "fraud" by definition would tend to reward subtle and ingenious circumvention and is not done.' "

37 *C. J. Sec.* at p. 204 fraud is defined as

"An act or course of deception deliberately practiced with the view of gaining a wrong or unfair ad-

vantage; deceit; trick; an artifice by which the right or interest of another is injured." (Cites in support Eliason v. Wilborn, 167 N.E. 101; affirmed 50 S.Ct. 382; 281 U.S. 547.)

The quotation is from the opinion of the Illinois Supreme Court, and is taken from *Storey's Equity Jurisprudence,* Vol. 1, Secs. 186, 187. This case was affirmed by the Supreme Court without any discussion of the question of fraud but the affirmation of the Illinois court's decision indicated approval by the Supreme Court of such holding as to fraud.

Certainly under such definition the conspiracy here charged and admitted constituted a fraud.

In *Wells v. Zenz,* 83 Cal. App. 137 the Court in discussing fraud states:

"* * * No definite and invariable rule can be laid down as a general proposition defining fraud, as it includes all surprise, trick, cunning, dissembling, and unfair ways by which another is deceived. (Armstrong v. Wasson, 93 Okl. 262 (220 Pac. 643).)

The statutes of California expressly provide that the suppression of a fact by one who gives information of other facts likely to mislead for want of communication of the fact concealed is deceit (Civ. Code, sec. 1710), and any other act fitted to deceive is actual fraud. (Civ. Code, sec. 1572.)"

The Civil Code of the State of California states in definite terms the right of every individual to be free of injury at the hands of another. Sec. 1708 provides as follows:

"Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his rights."

It was held in

People v. Wisecarver, 67 Cal. App. 2d, at 207:

"Fraud may be committed by declaring to be true that which the declarant does not believe to be true; by suppressing a fact which he is bound to disclose; or by making a promise without any intention of performing it. (Civ. Code, sec. 1710; Wells v. Zenz, 83 Cal. App. 137, 140 (256 Pac. 484).) Moreover, any act fitted to deceive is actual fraud. (Civ. Code, Sec. 1572.)"

Further authorities in point are as follows:

In 37 *C. J. Sec.,* page 246, sec. 16(b) it is said:

"* * * If the fact concealed is peculiarly within the knowledge of one party and of such a nature that the other party is justified in assuming its non-existence, there is a duty of disclosure, and deliberate suppression of such fact is fraud."

In *Heroz v. Capital Co.,* 27 C.(2) 349, subds. (5) and (6), it was held:

"The sellers of a house have a duty to reveal the hidden and material facts with regard to structural defects concealed by their agent and of which they have knowledge, and their failure to disclose them constitutes fraud."

Funk & Wagnall's New Standard Dictionary defines "Fraud" as follows:

"Fraud: (1) An act of deliberate deception practiced with the object of securing something to the prejudice of another; a trick or *stratagem intended to obtain an unfair advantage;* craft; circumvention; trickery.

(2) (Law) *Any artifice* or deception, *practiced to* cheat, deceive, or *circumvent* another to his injury." (Italics ours)

"Artifice" is defined as follows:

"ARTIFICE: (1) Subtle or deceptive art in contriving; trickery; strategy; as to lure by artifice.

(2) Any instance of cunning skill, intended to deceive *or outwit;* a strategem; an ingenious contrivance. *An artifice is a carefully and delicately prepared contrivance for doing indirectly what one could not well do directly.*" (Italics ours)

Please note how aptly these two definitions fit in with Sec. 1708 of the California Civil Code (cited above) requiring all to abstain from injuring the person or property of another. Under the definitions cited above, a conspiracy to destroy another financially is certainly an injury to both the person and property of another, as well as an infringement upon the rights of the person against whom the conspiracy is directed.

THE PRE-TRIAL ORDER WAS DIRECTLY CONTRARY TO THE HOLDING OF THIS COURT.

Fleishhacker v. Blum, 109 Fed. 2d, 543 cited on p. 17 of our opening. In that case the question arose as to when the statute of limitations began to run and called for an interpretation of subd. 4 of Sec. 338 of the California Code of Civil Procedure. It will be recalled that such subdivision reads as follows:

"4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the *discovery,* by the

> aggrieved party, of the facts constituting the fraud or mistake." (Italics ours)

It became necessary for this Court to define "discovery" and on that point the Court stated:

> "The word 'discovery,' as used in the statute, *means actual knowledge,* or knowledge of facts which, in the exercise of due diligence, would have led to an actual discovery of the fraud. Consolidated Reservoir & Power Co. v. Scarborough, 216 Cal. 698, 701, 703, 16 P.2d 268; Lady Washington etc. Co. v. Wood, 113 Cal. 482, 46 P. 809; Victor Oil Co. v. Drum, 184 Cal. 226, 240, 193 P. 243; Prentiss v. McWhirter, 9 Cir., 63 F.2d 712, 715." (Italics ours)

Note, please, that "discovery" means "actual knowledge," not "belief," on the part of the complaining party that he had been injured. "Belief" or "suspicion" play no part. We respectfully submit that the *Blum* case, standing alone, reverses this case. All of the California cases cited on p. 16 of our opening, particularly *Hansen v. Bear Film Co.,* 28 Cal. 2d, 154; 168 P.2d, 946, subds. 11 and 12, fix the initial date of the running of the statute as of the *discovery* of the cause of action, not when plaintiff "believed" that he had been injured by the wrong of the defendant. *Holmberg v. Armbrecht,* supra, is also controlling on this point.

Of course, every time appellant was injured by one of these overt acts it knew that it was being hurt, but mere "suspicion" or "belief" that appellees were responsible therefor and were acting in concert in violation of the anti-trust laws, did not start the running of the statute,

for until the *cause of action* was "discovered" in September of 1944, the statute did not begin to operate.

Suspicion is not discovery.

Kalkruth v. Resort Properties, 57 Cal. App. 2d, 146; 134 Pac. 2d, 513 (cited on p. 19 of our opening); *American Surety Co. v. Pauly*, 170 U.S. 133 (cited pp. 18 and 19 of our opening).

"Belief" is defined in Webster's International Dictionary of the English Language in part as follows:

> "Belief" admits of all degrees, *from the slightest suspicion* to the fullest assurance."

Therefore, when the lower Court fixed "belief" as one of the basic tests of its pre-trial order, it in effect held that "belief" of appellant, *based on the slightest suspicion*, that it had been damaged through the violation of the anti-trust laws by appellees, started the running of the statute; such holding was contrary to the ruling of both the United States Supreme Court (*Holmberg* case) and of this Court (*Fleishhacker v. Blum*) as well as that of the California courts. Neither "belief" nor "suspicion" constitutes the starting point of the statute of limitations—the time of "discovery" of the cause of action fixes such starting point.

We therefore respectfully submit that the pre-trial order of the lower Court was error in law as well as in fact. In no authorities is it even intimated that "belief" on the part of a plaintiff that the wrongs suffered by him had been caused by defendants pursuant to a violation of law, or that defendants had committed such violation, constituted "discovery" within the meaning of the statute

of limitations or of the equitable doctrine laid down in the *Holmberg* case. This Court has also so spoken in the *Fleishhacker* case, supra, and which holding has never been questioned. The insertion of the word "belief" in the pre-trial order destroyed it from a legal standpoint and the fixing of the date of May 17, 1929 (almost six months prior to the formation of the conspiracy of '29 —the cause of action) from a factual basis.

III.

AS TO THE FOSTER & KLEISER CASE.

At the outset of counsel's brief this statement is made:

> "The case is governed by the decision of this Court in Foster & Kleiser Co. v. Special Site Sign Co., 85 F.2d, 742 (Cert. den. 299 U.S. 613)."

They therefore rest their whole case on such citation. If they can find no stronger pillar, their attempt at distraction fails and their defense falls to pieces. It merely requires a careful reading of such cited case to show the correctness of the foregoing statement. It has no application of any kind to this particular case for it was a straight action at law where neither fraud nor misrepresentation nor concealment was present. The fact that time had barred a recovery *at law* due to the statute of limitations, was undisputed but plaintiff there attempted to claim fraud and concealment, in which claim he was immediately defeated as soon as the president of plaintiff testified that the general manager of defendant Foster & Kleiser, had stated directly to such president that defendant company was "out to get you," and enumerated five

companies that defendant had put out of business (p. 752). That statement had been made many more than three years prior to the commencement of the action, and gave direct notice to plaintiff of the illegal activities of defendant and of its intent and purpose to put plaintiff out of business as it had done to other companies. Certainly where there is such a bald, open statement of intent and purpose made directly to the party intended to be injured, there was no fraud or concealment, hence no basis for the application of the equitable doctrine of estoppel. Therefore the case resolved itself into a straight action at law, and the statutory period of limitations having expired, the Court had no alternative but to find for the defendant.

The facts in the present case are absolutely to the contrary, where conspiracy, fraud and concealment are all present. Here appellant was totally unaware of the activities of appellees in the formation and operation of the 1929 conspiracy. That fact is without dispute for the complaint alleges that appellant knew nothing of the '29 conspiracy or that the activities of appellees were pursuant thereto, until the fall of 1944. It is on this point that appellees led the lower Court astray and are endeavoring to do likewise on this appeal; appellees make no mention of the '29 conspiracy, neither denying the same nor the activities pursuant thereto, but attempt by referring to various other earlier conspiracies which surrounded certain overt acts, to draw the attention of the Court away from the cause of action given by the 1929 conspiracy and endeavor to claim that because appellant knew it was being damaged by such overt acts, it thereby "discovered"

the cause of action on which the complaint is based. It was due to the persuasion of appellees to such end that the lower Court made its error in settling its pre-trial order as it did.

All that the Foster & Kleiser case decided is that if, in an action at law, the defendant admits to plaintiff that it is determined to destroy him, there is no fraud or concealment on which to base an estoppel and thereby turn the case over to the equity side of the Court. A careful reading of the citation shows that all else is mere dicta of the writer of the opinion. While the question of continuing conspiracy is referred to it is passed by most casually and the discussion thereon was of the slightest kind—probably due to the fact that even applying the doctrine of continuing conspiracy, the statute had run, for such doctrine of continuing conspiracy does not mean that the plaintiff's right of action continuously and for all time exists; it does go to the extent that where there are a series of overt acts each one pursuant to and in furtherance of the original conspiracy, the statute will not begin to run until the performance of the last of such overt acts.

The *Foster & Kleiser* case was decided on September 22, 1936. *Fleishhacker v. Blum* was decided by this Court on February 7, 1940 and definitely lays down the definition of "discovery." It is significant that in the opinion in the *Blum* case no reference is made to the *Foster & Kleiser* case, neither in the discussion of the statute of limitations nor of the fraud claimed in that case.

The *Holmberg* case was decided by the Supreme Court February 25, 1946 and laid down definitely the rules as to

adoption by a court of equity of a cause wherein fraud and concealment exist and the statute of limitations is urged as a defense against such claim of fraud and concealment. Any statements by way of dicta or otherwise which appear in the *Foster & Kleiser* case and which would seem to be contrary to the holding of the *Holmberg* case of course disappear in the face of the latter decision.

We respectfully request a careful reading of the *Foster & Kleiser* case, when it will be realized to what extent the hopes of appellees rest only in the dicta of such opinion.

The writer of this brief yields to no one in regard and respect for the author of the *Foster & Kleiser* opinion, and perhaps the best way to leave such citation is to quote from *United States v. Buxton Lines,* 165 F.2d, 993 (4th Cir.) at p. 995, subd. (1):

> "These quotations from the opinions of the courts if taken literally support the Government's position; but 'It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but should not control the judgment in a subsequent suit * * *' Cohens v. Virginia, 6 Wheat. 264, 399, 5 L.Ed. 257."

IV.

AS TO THE CLAIM THAT THE COMPLAINT DOES NOT ALLEGE FACTS CONSTITUTING FRAUDULENT CONCEALMENT (Brief, p. 67).

Herein it is contended that a violation of the anti-trust law is not in itself fraudulent concealment. We have answered that contention in other portions of this brief where it is demonstrated that a conspiracy in and of itself

constitutes a fraud upon the party against whom the conspiracy is directed. In this portion of their brief counsel attempt to transform the "fraudulent concealment" cases cited in our opening to those involving fiduciary and confidential relationships. When fully read such cases really resolve themselves into cases of fraud—a conspiracy to conceal and to do injury to the plaintiff, thereby bringing them under the doctrine laid down in the *Holmberg* case.

The complaint charges that the 1929 conspiracy was formed (Tr. p. 34) and that charge is not denied. Pars. 63 to 68 inclusive (pp. 35-37 of the Transcript) set forth further the provisions of the '29 conspiracy. They allege the activities of the appellees pursuant to such conspiracy. In Par. 71 of the complaint (Tr. p. 39) is set forth in part the effects of the conspiracy; also the activities of appellees in the Little Placer Claim situation described in Par. 77 et seq. (Tr. p. 48). All of these allegations are admitted by the failure of appellees to deny them and do constitute "fraudulent concealment" as above defined.

V.

AS TO THE CLAIM THAT THE PRESENT IS NOT A SUIT IN EQUITY (Brief, p. 50).

This part of the brief is an effort to escape the rule of the *Holmberg* case. We do not question the authorities cited as to an ordinary suit for treble damages being an action at law. That is admitted. But where fraud enters into the situation, Equity extends its arm and draws to it the cause and all of its facts. Such was in effect the ruling in the *Holmberg* case, for aside from the concealment by Bache of his ownership of stock in the bank, the action

would have been one at law for simple recovery of the treble damages given by Congress to persons injured by violations of the Bank laws. But where defendants admit the formation of a conspiracy, and where they admit their activities thereunder, and then endeavor to escape liability by an attempt to turn the statute of limitations into a sword rather than a shield, thus eluding punishment or liability resulting from their activities, and which activities have been fraudulently concealed, the equitable doctrine of estoppel applies and the case at once resolves itself into an equity situation, with all of the principles of that branch of law applying themselves to do justice to the injured party.

Counsel (p. 53) contend that our present contention is inconsistent with our position below. In support thereof counsel cite certain statements made on the pre-trial conference in which counsel for appellant stated "The statute would have run unless we did allege and prove some excusatory facts." Such statement does not constitute any claim contrary to our present position. The "excusatory facts" referred to consisted of the equitable principle of estoppel which we have been attempting to apply throughout this whole case. In a case of this character, excusatory facts can only arise in equity. The application of excusatory facts constitutes no more than the tolling of the statute of limitations pursuant to the well established principles of equity.

VI.

AS TO THE CONTENTION THAT A DENIAL OF A CLAIM OR ACCUSATION OF WRONGDOING IS NOT FRAUDULENT CONCEALMENT (Brief, p. 69).

Under this heading counsel claim that the denials of guilt by appellees, or some of their officials, when so charged by Mr. Burnham, did not constitute fraudulent concealment. Such is not the law. While it may be true that a defendant may not be obliged to answer and mere silence is not admission, still, if he presumes to and does reply to a charge he must speak the truth and his failure to do so constitutes fraudulent concealment. This was definitely decided in the case of

Kimball v. P. G. & E., 220 Cal. 203,

where at p. 219 it was said:

> "***In this connection, it is well to keep in mind the elementary principle set forth in 12 Ruling Case Law, p. 310, section 71, as follows: 'Even though one is under no obligation to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells, but also not to suppress or conceal any facts within his knowledge which will materially qualify those stated. If he speaks at all he must make a full and fair disclosure. To tell a half truth has been declared to be equivalent to the concealment of the other half. A partial and fragmentary disclosure, accompanied by the wilful concealment of material and qualifying facts, is not a true statement, and is as much a fraud as an actual misrepresentation, which, in effect it is. Therefore, if one wilfully conceals and suppresses such facts, and thereby leads the other party to believe that matters to which the statements

made relate are different from what they actually are, he is guilty of a fraudulent concealment.' ''

This case was affirmed and the same rule laid down in *Sears v. Rule,* supra (27 Cal. 2d, 131).

The evidence shows that on October 19, 1937 Mr. Burnham called on Mr. Emlaw and Mr. F. C. Baker, both of appellee American Potash & Chemical Corporation, and at that time both of such parties denied that there was any connection between their company and the other appellees Pacific Coast Borax Company or Borax Consolidated, Ltd. (Tr. p. 148; also 394 to 396 top of page). It was not necessary for either Mr. Emlaw or Mr. Baker to reply to the charges or inquiries of Mr. Burnham but when they did so, they were required to speak the truth, and having failed to do so, they were guilty of a fraudulent concealment. This is only one of several instances where similar situations arose.

Under this same heading counsel cite authorities to the effect that when an injured party is put on notice he must investigate to discover the exact facts, in this case the 1929 conspiracy. The evidence shows that Mr. Burnham was most assiduous in all of his efforts, both to enlist the Federal Government in an investigation of the activities of appellees, and in his own attempts to discover the facts. The complaint and also the cross-examination of Mr. Burnham fully demonstrated his endeavors over a period of years to determine the real situation and to discover the cause of the activities of appellees and to ascertain whether or not such activities were based on violations of law. The letters written by Mr. Burnham to various Government officials and introduced in the trial, bristle

with endeavors to ascertain the truth. The fact that he was unable to persuade the Government into action was not his fault; his efforts nevertheless continued and it is impossible to conceive of more earnest and active attempts to discover the facts.

The evidence shows that the concealment by appellees of their fraudulent activities was so managed that even the Government could not discover the actual facts until after the commencement of World War II, and it was only after the Government finally developed the facts and commenced its proceedings in the fall of 1944 that the true light dawned upon all of these parties who had been so grievously injured by appellees. The true facts were not discovered until the Government discovered that the capital stock of appellee American Potash & Chemical Corporation was owned by German interests, not by the British concerns formerly believed to be in control. Upon discovering the German ownership the Government seized the books and records of such appellee and through them discovered the conspiracy of November 1929 with all of its attendant facts. This explains the reason why Mr. Burnham could secure no satisfaction from the Government agencies to which he appealed for assistance, for up until the seizure of the German-held stock the Government had no *proof* of the existence of the conspiracy.

VII.

THE LOWER COURT ERRED IN REFUSING TO ALLOW COUNSEL FOR APPELLANT TO READ THE COMPLAINT AND ANSWER TO THE JURY.

The main answer counsel make to this very important point is that to have permitted a reading of the complaint

would have been to inflame the jury so as to prevent it from giving fair consideration to the issues to be submitted! That is certainly a novel attempt at extension of the pleas of confession and avoidance, and is to say that because the facts admitted by appellees were of such a nature as to convict them, such admission and facts should not be given to the jury. The allegations admitted by appellees constituted evidence and proof of facts which at various points in their brief appellees claim were not proved, forgetting that as long as such facts were admitted there was no need of proving them.

Counsel also contend that the lower Court granted them permission to file a special answer to raise the plea of the statute of limitations. The order also provided (Tr. p. 185) that the time of defendants to answer on the merits was extended to a date ten days after determination of the special issue, if the same was decided adversely to appellees. Instead of confining their answer directly to the plea of the statute, they also added a denial of three of the allegations of the complaint, viz. Par. 75 involving the statement of the conversation in May 1929 between Mr. Burnham and Mr. Zabriskie (Tr. p. 46), and Par. 81A alleging that the plaintiff was without knowledge of the conspiracy, that the same was fraudulently concealed from plaintiff, and was not discovered by plaintiff until September 1944 (Tr. p. 100); also Par. 81B (Tr. p. 102) also alleging concealment. On a trial of the special issue of the statute alone, appellees had no right to deny any of the *factual* allegations of the complaint. They took the complaint as it stood and based their defense wholly and solely on the statute of limitations as applied to the whole of the complaint, not to portions thereof. If the lower Court

attempted to give appellees an order to such effect it was of course improper and without the power of such lower Court so to do.

We do not question the right of appellees to answer the complaint in full and then add a special plea of the statute of limitations, but even in that situation the special trial on the statute would have been with the same force and effect as though appellees had not answered the complaint in whole, for on a special trial on such statute the latter plea would have admitted all of the allegations of the complaint for the purposes of such special issue. In other words, appellees could not blow both hot and cold—if they relied on the statute they admitted the allegations of the complaint; if they went to trial on the merits they also admit those allegations of the complaint not denied. Where the trial is solely upon the statute, appellees cannot deny in support of such plea the *factual* allegations of the complaint or any part of them. This appellees attempt to do in the present case. The special trial went forward on the complaint and the plea of the statute. The reading of the pleadings to the jury is always permissible, and the refusal of the lower Court to grant counsel for appellant such right was in itself reversible error, for it is always proper to present to the jury for their consideration the admissions of the defendants.

Furthermore, in the absence of admissions of the facts alleged in the complaint there would be nothing to which the statute of limitations could apply. In other words, if there are no facts, proved or admitted, there can of course be no plea of the statute. There must be facts alleged to which a plea of the statute could be made, and the only way of placing such facts before the jury on the trial of

the special issue on the statute, would be to read to the jury the facts set forth in the complaint.

VIII.

AS TO THE CONTINUING CONSPIRACY.

This question is discussed in our opening commencing p. 32 where we set forth the rule laid down in *United States v. Kissel,* 218 U.S. 601 and other authorities. To this appellees reply (p. 55) by the contention that the cited authorities on this point all refer to criminal cases and not to civil actions. No explanation is offered as to why the rule should be different in criminal and in civil cases. It is also contended that this Court in the *Foster & Kleiser* case, supra, expressly held that the *Kissel* case was inapplicable to a case of this character. As we have shown in our discussion of the *Foster & Kleiser* case, such was not the holding of this Court. At most, all the Court there did was to ignore the point and there was no holding to the extent claimed by counsel.

The Kissel case was an anti-trust prosecution and all that Justice Holmes said in his opinion, we respectfully submit, would cover the situation in a civil action. 15 U.S.C.A. Sec. 15 under which the present action is brought expressly provides that any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor, etc. The acts forbidden by the anti-trust laws are set forth in Secs. 1 and 2, so that these treble damage actions are brought directly under the specific provisions of the same Act, under which the same defendants may be criminally prosecuted. Neither counsel nor ourselves have been able to discover any authorities which pass directly upon this point and so

this becomes a case of first impression to the extent of such question.

The case most nearly approaching this point was

> *Northern Kentucky Telephone Co. v. Southern Bell Telephone, Etc.,* 73 F.(2), 333 (C.C.A. 6) (Cert. den. 55 S. Ct. 546).

This was a civil action in which it is apparent that the doctrine of "continuing conspiracy" would have been applied but for the fact that the last overt act was beyond the statutory period. Please note particularly the statement of the court appearing on page 335.

The case of *Maltz v. Sax, et al.,* 134 F.2d, 2 (Cert. den. 319 U.S. 772) was a treble damage action. The Court there held (subd. 3):

> "The grant to persons injured through an unlawful combination or conspiracy in restraint of commerce of a cause of action for treble damages was for purpose of multiplying agencies which would help enforce Sherman Anti-Trust Act and therefore make it more effective. Sherman Anti-Trust Act, Sec. 1, 15 U.S.C.A. Sec. 1; Clayton Act, Sec. 4, 15 U.S.C.A. Sec. 15."

In *Weinberg v. Sinclair Refining Co.,* 48 F. Supp. 203, Subd. (4) p. 205 it is stated:

> "The three-fold damage clause of Section 15 was designed to supply an ancillary force of private investigators to supplement the Department of Justice in law enforcement. Quemos Theatre Co. v. Warner Bros. Pictures, D.C., 35 F. Supp. 949."

These two authorities certainly dispose of counsel's contention (p. 55) that "a treble damage suit by a private party is not brought to vindicate the law." As such author-

ities show, the very purpose of the treble damage provision is to supplement in every way the activities of the Government in the enforcement of the Act; there is no question as to that, and such being true every benefit that accrues to a Government prosecution should likewise apply to a treble damage civil action. The theory of the treble damage provision is that the defendant should suffer a penalty because he has committed a crime. It was written with the knowledge that the Government would not be able to reach very many violations of the Act; therefore each injured party, as stated in the *Weinberg* case, was made and constituted a kind of private policeman. The purpose of giving a plaintiff treble damages has nothing to do with compensating him. It is an *in terrorem* procedure to deter other people from violating the Act and in this respect has precisely the same purpose as a criminal penalty. A rule for the collection of three times the actual damages is in effect a punishment for the commission of a crime. One of the purposes of the statute is to take the burden of enforcing the Act from Government enforcement agencies and enlist private parties in the business of law enforcement. This is shown by the section making a finding in a Government action *prima facie* evidence in a private suit. While this is a somewhat unusual provision it shows clearly that Congress realized the impossibility of the ordinary plaintiff ever proving a cause of action against a great corporation which has committed violations of the Act comparable to its size and power. It also shows the intention of Congress to induce private parties to add to the fines and penalties which the defendant must pay in a Government suit. It is in effect an invitation to plaintiffs to wait until the Government has acted and found their evidence for them.

In this case the Government has acted (Criminal and Civil Proceedings of 1944). The Government discovered the evidence that appellant needed. Appellant was in total ignorance of the facts of such '29 conspiracy and was therefore unable to produce that evidence prior to the Government action. The purpose of the statute under these circumstances would be frustrated if the statute of limitations now bars this action. This matter was not even discussed in the *Foster & Kleiser* case or in any of the other cases cited.

These thoughts apply particularly to the case at bar and distinguish it from the authorities cited by counsel because none of such cases, so far as our memory serves us, involved a cause of action of which the plaintiff was ignorant but which was brought to light by the subsequent discovery of the Government. Also, what would be the purpose of a provision allowing plaintiff to rely on the Government findings for evidence if the statute of limitations is to bar him from that unusual statutory privilege? Some of these anti-trust cases took years to try and if the rule excluding the doctrine of continuing conspiracy should be applied to cases of this character, plaintiffs would be deprived of their right to benefit by the Government's proof merely by the length of the trial. Why should the defendants have a windfall of this character simply because of the lack of manpower of the Government and its inability to fulfill its duty of uncovering anti-trust violations for the benefit of victims? That the statute intended to confer this benefit is clear. To make this benefit effective the doctrine of continuing conspiracy must be applied to treble damage actions. Furthermore, why should defendants such as the appellees be permitted to escape their

just legal and moral responsibility to those whom they have so grievously injured, after admitting, as they have on this motion, all of the vicious activities charged in the complaint, on the contention that the rule of continuing conspiracy always applied in criminal cases, should not be applied when their pocketbook is attacked—the only means which an individual has of recouping his losses caused by the wrongful activities of the defendants. The Anti-Trust Act was not passed to become a cloak and shield to wrongdoers from civil liabilities. There is no conceivable reason why a defendant in a criminal prosecution should be subject to the rule of continuing conspiracy and be exempt from it in a treble damage action brought against him for the same wrong by the party whom he has injured. The one wrong is the basis of both proceedings, viz. criminal charges and civil liability, and if the defendant is subject, as he is, to the rule of continuing conspiracy on his criminal prosecution, he certainly should have the same rule meted out to him in the civil cause. No distinction exists, and we respectfully submit that this Court has the opportunity of firmly establishing such rule.

The present case illustrates the point. Here the complaint alleges and the evidence shows a long line of overt acts after the formation of the conspiracy in November 1929, some of which were (a) the continuous prosecution of the fraud order case and the reinstatement of such order in September 1937; (b) the loss of appellant's lease at Searles Lake in January 1938; (c) the defeat of appellant's efforts to secure the reinstatement of its Searles Lake lease during 1938 and 1939; (d) the acquisition by the American Potash & Chemical Corporation, an appellee herein, in November 1939 of the deposits of borax formerly

held by appellant at Searles Lake; (e) the seventeen-year opposition to appellant's efforts to secure the Little Placer property; and (f) the continued harassment of appellant from 1929 to the date of the Government's action in 1944.

Each one of such overt acts constituted a separate conspiracy, all pursuant to the general conspiracy of November 1929, and each continuing the purposes of such general conspiracy. These activities would all be provable as against the statute in a criminal conspiracy involving the incarceration of the body of the appellees, so why should the same rule not also apply to a civil action for damages, one against the pocketbooks of the same defendants and arising out of the same violations, and under the same provision of law?

We submit that there is no logical or reasonable basis for the distinction urged by appellees.

The last overt act in the Little Placer activity began on September 1, 1944, when an action was brought by the United States Borax Co. against the Secretary of the Interior to enjoin him (Tr. pp. 48-53). On p. 62 of counsel's brief they claim that no cause of action existed arising out of the Little Placer activity, because no special damage was shown. In an action of this character general damages can be claimed in general terms, as has been done in the complaint here, Par. 81 (Tr. p. 53). It was appellees' actions pursuant to the general conspiracy that prevented the securing of the Little Placer by appellant, and the present is not a collateral attack on the judgment of the Land Office as charged by counsel on pp. 62-63. The question of whether or not the Little Placer activity constituted an overt act, and the question of damages resulting from such activity, are both questions of fact subject to proof

on the trial on the merits of this cause and are not applicable herein.

On p. 61 of their brief, subd. I, counsel claim that if any claim to damages re the Little Placer existed, it would be barred by the statute of limitations. The factual statements made above refute this contention, for the last overt act in connection with the Little Placer did not begin until September 1, 1944. The action against the Secretary of the Interior by the United States Borax Company was dismissed on August 16, 1945 pursuant to an order of the District Court of this District. At that time there was in effect a moratorium tolling the statute of limitations. On October 10, 1942 Congress passed such Moratorium Act (Ch. 589, 56 Stats. 781, 77th Congress, Second Session) suspending the running of any existing statute of limitations applicable to civil proceedings under the anti-trust Act, from that date until July 30, 1945, and on the last named date such Act was extended for an additional year, or to July 30, 1946. Accordingly such four years must be eliminated in the computation of any period of limitations or laches.

Therefore, the last overt act pursuant to the conspiracy of 1929 was started September 1, 1944 and the present action was commenced on July 3, 1945—well within the statutory period.

CONCLUSION

In concluding we respectfully contend that this case should be reversed upon the following grounds:

1. The conspiracy of November 1929 was the cause of action upon which the complaint was based. The lower Court erred in not holding the proof offered

by appellees to the conspiracy of 1929, and in allowing appellees to inject conspiracies occurring prior to November 1929 and surrounding the various overt acts; by doing so the lower Court permitted the interjection of causes of action not sued upon.

2. The lower Court erred in the form of its pre-trial order, for the same was inherently and fundamentally erroneous in law and incorrect factually. "Discovery"—or the ability to discover—not suspicion or "belief" is the test.

3. The lower Court erroneously usurped the functions of the jury. Mr. Burnham denied expressly the questions presented by the pre-trial order, and all of the evidence introduced on cross-examination (and we contend erroneously admitted) was an endeavor on the part of appellees to show knowledge on the part of Mr. Burnham, or means of knowledge, of the conspiracies surrounding the overt acts antedating the '29 conspiracy—the cause of action. None of such evidence had any relation or reference to the cause of action herein, the '29 conspiracy. Standing alone, such denials of Mr. Burnham and such admitted evidence presented questions of fact which should have gone to the jury, even if it could be presumed that the pre-trial order and the admission of such evidence were correct.

4. The present is an action in equity, becoming so when appellant raised an estoppel by urging fraud and concealment on the part of appellees. This cause is directly within the ruling of *Holmberg v. Armbrecht,* supra; therefore the State statutes of limitation are not applicable.

5. The lower Court erred in refusing to allow counsel for appellant to read to the jury the complaint and the answer thereto, for the failure of appellees to answer most of the complaint constituted an admission of the charges contained therein. Furthermore, the plea of the statute of limitations constituted an admission of all of the allegations of the complaint, and appellees were without the right to answer a portion of the complaint and ignore the balance thereof. The attempted answers by appellees to three paragraphs of the complaint are of no moment and should not be considered, for they cannot call to their assistance a denial of factual allegations to uphold them in urging their purely legal plea of the statute of limitations.

6. The conspiracy of November 1929, which is the basis of the cause of action charged upon, was a continuing conspiracy, and the statute of limitations did not commence to run until the completion on August 16, 1945 of the last overt act performed pursuant to such conspiracy and which completion was prior to July 30, 1946, when the moratorium tolling the statute of limitations expired.

Respectfully submitted,

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